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ALEXANDER L. STEVAS,
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NO. 83-1272

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ROBERT FRANK LEE,
Petitioner,

v.

CITY OF KNOXVILLE, TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER A SINGLE ISOLATED INCIDENT OF POSSIBLE NEGLIGENCE ON THE PART OF A MUNICIPALITY IS SUFFICIENT TO ESTABLISH A POLICY, PRACTICE, OR CUSTOM ON THE PART OF SAID MUNICIPALITY OF FAILURE TO TRAIN, SUPERVISE, AND/OR CONTROL ITS POLICE OFFICERS THUS GIVING RISE TO MUNICIPAL LIABILITY BASED UPON 42 U.S.C. SECTION 1983.

2. WHETHER A MUNICIPALITY CAN BE LIABLE FOR DAMAGES UNDER 42 U.S.C. SECTION 1983 FOR A POLICY AND CUSTOM ESTAB-

LISHED AND MAINTAINED BY COUNTY OFFICIALS YET FOLLOWED BY MUNICIPAL POLICE OFFICERS.

LIST OF PARTIES

Pursuant to Supreme Court Rule 34.2, the Respondent deems the List of Parties presented by the Petitioner adequate and respectfully relies thereon.

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OPINIONS BELOW

Pursuant to Supreme Court Rule 34.2, the Respondent deems the presentation by the Petitioner of the Opinions and Judgments delivered in the Courts below adequate and respectfully relies thereon. Additionally, throughout this Brief in Opposition to Petition for Writ of Certiorari, references to the Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit shall be noted herein as the Petitioner's "Brief." The opinions below have been reproduced in the Petitioner's "Brief," pages A-1 through C-11 and the Respondent respectfully relies thereon.

JURISDICTION

Pursuant to Supreme Court Rule 34.2, the Respondent deems the jurisdictional statement presented by the Petitioner adequate and respectfully relies thereon.

STATUTES INVOLVED

Pursuant to Supreme Court Rule 34.2, the respondent deems the presentation by the Petitioner of the Statutes involved in this case adequate and respectfully relies thereon.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 34.2, the Respondent deems the Statement of the Case presented by the Petitioner adequate and respectfully relies thereon except for the following:

1. It is important to note in the case sub judice persons or entities which were not parties to the Petitioner's lawsuit. No policy making official of the City of Knoxville was a party to this lawsuit and no policy making official of the City of Knoxville testified in this lawsuit. The only

trace of "supervisory" testimony or evidence in this case is from the testimony of City of Knoxville Internal Investigation Unit Investigator David Michael Adkins. Also, with regard to the issue of the incarceration procedures followed in this case, neither Knox County nor the Knox County Judges responsible for formulating the policy and procedures were made parties to this lawsuit.

2. The Statement of the Case presented by the Petitioner contains numerous

statements of fact which are, at the very least, uncertain from the record herein. For the sake of argument only, the Respondent will accept the Statement of the Case presented by the Petitioner. The Respondent will then conclusively demonstrate that well established precedents supplied by this Court preclude any need for review in this case.

REASONS FOR NOT GRANTING THE WRIT

Contrary to the assertions of the Petitioner, this case involves issues that have been well settled by this Court and followed by all of the Circuit Courts of Appeal. The fundamental principle which governs the disposition of this case is whether the actions of the City of Knoxville "alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by (the City's) officers," or "is visited pursuant to governmental 'custom' even

though such custom has not received formal approval through the (City's) official decision making channels." Monell v. New York City Department of Social Services, 436 U.S. 658, 690-91 (1978). Not only does the Petitioner agree that this is the guiding principle herein (see Petitioner's "Brief," pages 13, 22) but all of the Circuit Courts of Appeal agree as well. Cloutier v. Town of Epping, 714 F. 2d 1184, 1191 (1st Cir. 1983); Rookard v. Health and Hospitals Corporation, 710 F. 2d 41, 45 (2nd Cir. 1983); Czurlanis v. Albanese, 721 F. 2d 98, 108 (3rd Cir. 1983); Wellington v. Daniels, 717 F. 2d 932, 935 (4th Cir. 1983);

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For the sake of argument, we will assume that the "Statement of the Case" articulated by the Petitioner in his "Brief," pages 4-10, is correct. However, the record and transcript of evidence in this case, as the Sixth Circuit Court of Appeals stated (see Petitioner's "Brief" page A-6), "at best establishes simple negligence" on the part of the City of Knoxville with regard to the issue of supervision. The Petitioner has framed the issue in this case in terms of whether simple negligence by the City in the supervision of a police officer can support a claim for relief under 42 U.S.C. Section 1983 <u>against the City</u>.

This is far too simplistic and merely serves to blur the crucial distinction between the liability of a municipality for negligent supervision versus the liability of an individual supervisor for negligent supervision. The issue in the case sub judice can be correctly articulated in light of the above-quoted language from the landmark Monell case in terms of:

> Whether a single isolated incident of possible negligence on the part of a municipality is sufficient to establish a policy, practice or custom on the part of said municipality of failure to train, supervise, and/or control its police officers thus giving rise to municipal liability based upon 42 U.S.C. Section 1983.

The record in this case is far from clear on the issue of whether the City's failure to complete the investigation into the prior shooting involving Officer Stout prior to the incident which is the subject of this lawsuit constituted negligence. For the sake of argument, we will assume that the City may have been negligent. But as the Sixth Circuit noted, this "falls far short of establishing a governmental plan, policy or custom of misuse of firearms." (See Petitioner's "Brief," page A-6).

As mentioned above, pursuant to 42 U.S.C. Section 1983, there is a crucial distinction between the liability of

a municipality for negligent supervision versus the liability of a supervisor for negligent supervision. The Petitioner puts great weight on this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981). Parratt involves the situation where prison officials misplaced an inmate's hobby materials. The inmate instituted an action against the Warden and Hobby Manager pursuant to 42 U.S.C. Section 1983 for their negligence in misplacing the hobby materials. Id. at 530. The inmate claimed that he had been deprived of his property without due process of law. Id. at 531. The lower Courts held that the inmate could recover pursuant to 42 U.S.C. Section 1983 be-

cause the evidence established that there had been a "negligent deprivation" that could not be allowed without redress. Id. at 531. This Court reversed, implying at the outset (in dicta) that 42 U.S.C. Section 1983 did not have a scienter requirement. Rather, the Court stated:

> "Accordingly, in any Section 1983 action the initial inquiry must focus on whether the two essential elements to a Section 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Id. at 535.

The Court did not ultimately resolve Parratt on the negligence versus intentional deprivation issue. Instead, the Court reasoned that "due process" was available to the inmate through the State of Nebraska and that the inmate should have followed State procedures in seeking redress. Id. at 543. Thus, there was no "deprivation of property without due process."

The importance of Parratt v. Taylor, supra, in the case sub judice is limited since Parratt did not involve the liability of a governmental entity. The focus of the inquiry in 42 U.S.C. Section 1983 cases involving municipalities is,

pursuant to Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), whether the municipality's policy, practice, or custom caused a deprivation of an individual's rights as secured by the Federal Constitution or statute. Parratt teaches us that scienter is not relevant in determining whether a "deprivation" has occurred. But, Parratt must be read consistently with Monell. It is irrelevant whether a municipality acts "intentionally" or "negligently" in the formulation of its policies, practices, or customs. The issue is (1) whether a policy, practice or custom exists that

(2) caused a deprivation of an individual's Federal rights.

In isolated incidents of negligence on the part of a police officer or his/her supervisor, it is certainly conceivable that a deprivation of an individual's Federal rights could occur. But does that same isolated incident of negligence necessarily establish a policy, practice, or custom? The answer is certainly not. In Adickes v. Kress & Co., 398 U.S. 144, 167 (1970), this Court noted that custom denotes "persistent and widespread... practices." Common sense dictates that, at the very least, a pattern of negligent incidents emerges in

order to establish the requisite policy, practice, or custom.

On the other hand, some Courts have gone so far as to hold that an isolated incident of gross negligence may be sufficient to establish the requisite policy, practice or custom. Owens v. Haas, 601 F. 2d 1242, 1247 (2nd Cir. 1979). In Hays v. Jefferson County, 668 F. 2d 869 (6th Cir. 1982) cert denied 103 S. Ct. 75, the Court analyzed the liability of the governmental entity and the supervisor together in holding that gross negligence was required in order to hold either the governmental entity or the supervisor liable for failure to

train, control, or supervise its police officers. Id. at 874. Parratt v. Taylor, 451 U.S. 527 (1981) may have overruled Hays with regard to the liability of an individual supervisor but Parratt certainly does not overrule Hays with regard to the liability of the governmental entity. Pursuant to Hays, an isolated incident of simple negligence is insufficient to establish the requisite policy, practice or custom. However, gross negligence may be sufficient. Upon a careful consideration of Monell, Parratt, and Hays, it becomes obvious that the Petitioner has greatly misplaced his emphasis on the recent case of

Brandon v. Allen, 719 F. 2d 151 (6th Cir. 1983). Brandon deals solely with the liability of an individual supervisor and never addresses the crucial issue in municipal liability cases (i.e. does a policy, practice, or custom exist, etc.). Thus, Brandon is inapposite.

Lower Courts which have addressed the specific issue raised in the case sub judice are in accord with the analysis herein. In Wellington v. Daniels, 717 F. 2d 932 (4th Cir. 1983), the Court dealt with an isolated incident of possible negligence of a supervisor and the municipality, and held that insufficient to predicate liability upon the municipality:

"Generally, a failure to supervise gives rise to Section 1983 liability, however, only in those situations in which there is a history of widespread abuse. Only then may knowledge be imputed to the supervisory personnel.

(Citations omitted) A single act or isolated incidents are normally insufficient to establish supervisory inaction upon which to predicate Section 1983 liability.

(Citations omitted) Cf. Owens v. Haas, 601 F. 2d at 1247 (even an individual act of brutality by a county employee may be the basis for municipal liability where it arises from a municipal policy of inadequate training "so grossly negligent as to constitue 'deliberate indifference.'")

Once it has, indeed, been shown that there is a policy established and maintained by the City, the City is liable for any deprivation of constitutional right caused by conduct pursuant to that policy. The causal link may be direct, as in Monell, where the policy commands the injury of which the plaintiff complains. Or the causal link may be supplied by

tort principle that holds a person liable for the natural consequences of his actions. However, the initial inquiry is the existence of the policy. That inquiry is a complex one in a case such as this where the City's policy has not been articulated by but is alleged to be reflected in the omissions of the Chief of Police." (Footnote omitted)

Id. at 936.

"Although Chief Austin testified that he knew that the use of Kellite flashlights had caused serious and sometimes fatal injuries in other jurisdictions, and that members of his force sometimes used the Kellite flashlight as a weapon, he was not aware of any problems associated with prior use of the Kellite flashlight by members of the Newport News police force. He so testified, and no other evidence on the subject was adduced. Indeed, Gravelle could point to only the single incident during which the ward of the state was injured on which to predicate the Police Chief's supervisory and the City's municipal liability.

> Even in the context of a j.n.o.v. in the defendants' favor, in which all the evidence must be viewed favorably to Gravelle, (citations omitted), the record evidence did not support the jury's verdict. Therefore, the district court appropriately granted the j.n.o.v. There simply was not sufficient evidence to support a finding of City policy to allow use of a dangerous instrumentality, or any encouragement by Chief Austin of such use." (Footnote omitted) (Emphasis added)
>
> Id. at 937.

The requirement of a "pattern" or "history" of negligence is supported by other cases as well. See Trotter v. City of Chicago, 573 F. Supp. 1269 (N.D. Ill. 1983); McQuirter v. City of Atlanta, 572 F. Supp. 1401, 1420 (N.D. Ga. 1983); Overbay v. Lilliman, 572 F. Supp. 174,

177 (W.D. Mo. 1983). See also Hopper v. Hayes, 573 F. Supp. 1368 (Idaho 1983); Ladnier v. Murray, 572 F. Supp. 544 (Maryland 1983); Elam v. Montgomery County, 573 F. Supp. 797 (S.D. Ohio 1983).

It is crucial to note that, in the case sub judice, no supervisory officials of the City of Knoxville were made parties to the Petitioner's lawsuit. The only evidence of "supervisory" negligence must be deciphered from the testimony of David Michael Adkins, an investigator with the Internal Investigation Unit (IIU) of the City of Knoxville Police Department.

Whether the record supports the assertion that the IIU was negligent in failing to complete more quickly the investigation into the prior shooting in which Officer Stout was involved is certainly debatable. However, it is not subject to dispute that this was only an isolated incident. There is not even a scintilla of proof that a policy, practice, or custom existed within the City of Knoxville Police Department of failure to train, control, or supervise its police officers.

The applicable law regarding the supervisory issue is crystal clear. The only purpose of granting review in

this case would be to simply determine whether or not the record establishes a policy, practice, or custom on the part of the City of Knoxville of failing to train, supervise and/or control its police officers. The Sixth Circuit Court of Appeals has already performed such a review and has found that the evidence "falls far short of establishing a governmental plan, policy, or custom of misuse of firearms." Petitioner's "Brief," page A-6.

The second issue raised by the Petitioner involves <u>whether a municipality can be held liable for damages under 42 U.S.C. Section 1983 for a policy</u>

and custom established and maintained by Knox County officials yet followed by City of Knoxville police officers. The evidence shows that Knox County Judges instituted and enforced a policy of setting a standard bond for certain misdemeanor offenses, and in unusual cases or felony cases, a police officer would talk to the Judge over the phone to determine whether probable cause existed and the amount of bond required. This policy was utilized only at night when the Judge was not available since the Judge could not be awake twenty-four hours per day. The policy was designed to allow the person incarcerated the

quickest possible opportunity to post bond and be released from incarceration. Neither Knox County nor the Judges serving Knox County were made parties to this lawsuit. The principles enunciated in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) are clear. As the Sixth Circuit Court of Appeals noted, "Although Knoxville is responsible for Lee's incarceration, it has no control over the procedures used by county judges. It therefore had no unconstitutional policy or custom." Petitoner's "Brief," page A-9.

The City of Knoxville had absolutely no control over this method of

Knox County Judges which was used to comply with the Gerstein v. Pugh, 420 U.S. 103 (1975) requirement. Thus, the Petitioner's argument fails at the outset: no policy, practice or custom existed that is attributable to the City of Knoxville with regard to the procedures utilized after the Petitioner was incarcerated.

Notwithstanding the Petitioner's liberal construction of the evidence in this case, but for the sake of argument accepting that construction as valid, the applicable case law interpreting 42 U.S.C. Section 1983 is clear that the Petitioner has simply failed to

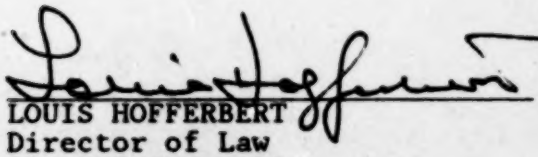
prove his case against the City of Knoxville. A single isolated incident of possible negligence on the part of a municipality is insufficient to establish a policy, practice, or custom attributable to said municipality. Not only is this the fundamental holding of Monell v. New York City Department of Social Services, supra, but, there is no case law which exists to the contrary. Likewise, the policy and practice of one governmental entity (Knox County and its Judges) cannot be imputed to another governmental entity (City of Knoxville). Granting the Petitioner's Writ of Certiorari would require this Court to repeat well established precedents which

the lower Courts have heretofore been correctly following. This is simply not a proper case for granting review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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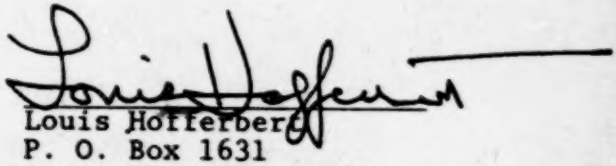
PROOF OF SERVICE

I, Louis Hofferbert, Attorney for the City of Knoxville, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of March, 1984, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on Herbert S. Moncier, 1832 Plaza Tower, Knoxville, Tennessee, 37929, attorney

for the Petitioner herein, by mailing copies of the same in duly addressed envelopes with postage prepaid.



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